The Fiduciary Exception to the Attorney-Client Privilege

By Danielle P. Ferrucci
Shipman & Goodwin LLP

The recent United States Supreme Court case of United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011), focused attention on a little-discussed, but, critical, aspect of the attorney-client privilege in the context of fiduciary litigation. In those jurisdictions where it is recognized, the so-called fiduciary exception precludes a fiduciary from asserting the attorney-client privilege against beneficiaries who seek disclosure of fiduciary-attorney communications. Essentially, application of the fiduciary exception to the attorney-client privilege requires disclosure of such communications to beneficiaries where the fiduciary sought the legal advice in exercising the fiduciary's duties and responsibilities on the theory that the fiduciary's duty to administer the trust solely for the benefit of the beneficiaries takes priority over the attorney-client privilege.

While the U.S. Supreme Court's decision in Jicarilla ultimately did not pass on the permissibility of the fiduciary exception to the attorney-client privilege, the case helped to focus attention on the conflicting decisions of courts in a variety of jurisdictions regarding the question of whether a fiduciary can rely on the attorney-client privilege to prevent disclosure to trust or estate beneficiaries of communications between the fiduciary and counsel. In addition, two recent Connecticut decisions reviewed the applicability of the exception to fiduciaries in Connecticut. The result of these cases is that a fiduciary must proceed with caution in determining whether its communications with counsel will receive the protections of the attorney-client privilege in disputes with beneficiaries.

United States v. Jicarilla Apache Nation

While the recent United States Supreme Court decision in Jicarilla purportedly addressed the application of the fiduciary exception to the attorney-client privilege and discussed the history of the exception at some length, the Court ultimately did not pass on the existence or parameters of the exception. The Court instead concluded that even if the fiduciary exception existed, it did not apply to the facts at issue in that case. Specifically, the Court held that the fiduciary exception did not extend to the federal government in its capacity as "trustee" of funds held in trust for the benefit of the Apache Nation because the government was not acting as a "private trustee." *Jicarilla*, 131 S. Ct. at 2323. The Court distinguished trust funds at issue in *Jicarilla* from private trusts as the Apache trusts are governed by statutes rather than the common law, and Congress has plenary authority over the organization and management of such trusts. *Id.* Therefore, while *Jicarilla* instructively reviewed the history of the fiduciary exception to the attorney-client privilege, the decision did not determine the continued viability of the exception in the private trust context.

Background to the Fiduciary Exception

The fiduciary exception to the attorney-client privilege originated with English trust cases in which courts concluded that communications between a fiduciary and his attorney must be disclosed to a trust beneficiary. *See In re Mason*, 22 Ch. D. 609 (1883); *Talbot v. Marshfield*, 2 Dr. & Sm. 549, 62 Eng. Rep. 728 (1865); *Wynne v. Humberston*, 27 Beav. 165, 54 Eng. Rep. 165 (1858); *see also* Austin W. Scott & William F. Fratcher, 2A The Law of Trusts § 173 (4th ed. 1987). This line of cases, and more modern cases following their reasoning, essentially hold that because communications between an attorney and a fiduciary ultimately benefit the beneficiary, such communications must be disclosed to the beneficiary. In the frequently cited case of *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 712-13 (Del. Ch. 1976), trust beneficiaries brought a trustee surcharge action and sought the disclosure of a tax memorandum drafted by attorneys to the trustee regarding anticipated tax litigation. 355 A.2d at 710. The issues involved in the potential tax litigation were the basis for the beneficiaries' surcharge claim. The Delaware Court ordered production of the memorandum, citing the aforementioned line of English cases and concluding that the attorney-client privilege did not bar disclosure because the intention of the communication between the attorney and the trustee was to aid the beneficiaries. *See id.* at 713-14.

While other courts have followed the reasoning of the *Riggs* opinion in holding that a fiduciary exception to the attorney-client privilege exists (*see, e.g., Comegys v. Glassell*, 839 F. Supp. 447, 448-49 (E.D.Tex. 1993)), many states have rejected application of the fiduciary exception. The courts in those cases have concluded that a fiduciary who retains legal counsel with respect to fiduciary matters is counsel's only "real client" for purposes of the attorney-

client privilege. *See, e.g., Murphy v. Gorman*, 271 F.R.D. 296, 315-20 (D.N.M. 2010) (rejecting any fiduciary exception under New Mexico law); *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 185 (Fla. Dist. Ct. App. 2001) ("An attorney retained to represent a trust represents the trustee, not the beneficiaries."); *Huie v. DeShazo*, 922 S.W.2d 920, 925 (Tex. 1996) (in rejecting fiduciary exception under Texas law, held "the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust's beneficiaries");[1] Courts espousing this viewpoint have also frequently concluded that the source of payment of the fiduciary's attorneys fees (i.e. from the trust) should not determine the availability of the attorney-client privilege in the private trust context. *See e.g. Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 598 (Cal. 2000) (in rejecting any fiduciary exception under California law).[2] In addition, some states have rejected the fiduciary exception by statute. *See* Fla. Stat. Ann. § 90.5021(2) (communication between lawyer and client acting as a fiduciary is privileged and protected from disclosure to same extent as if client were not acting as fiduciary); N.Y.C.P.L.R. § 4503(a)(2)(A) (providing that where attorney represents personal representative, the beneficiary of the estate is not a client of the attorney); *but see Estate of Barbano v. White*, 800 N.Y.S.2d 345, 2004 N.Y. Misc. Lexis 3016 (Sup. Ct. 2004) (applying the fiduciary exception with a showing of good cause after passage of N.Y.C.P.L.R. § 4503(a)(2)(A)).

In contrast to these decisions, some federal courts have applied the fiduciary exception to attorney-client privilege based on an evaluation of two criteria: (1) whether the trustee obtained legal advice as a "mere representative" of the beneficiary, making the beneficiary the "real client"; and (2) whether the fiduciary duty to furnish trust-related information to the beneficiaries, rooted in the trustee's fiduciary duty to disclose all information related to trust management, outweighs the interest in the attorney-client privilege. *United States v. Jicarilla Apache Nation*, 131 S. Ct. at 2322. Many of the federal cases address the applicability of the fiduciary with respect to ERISA trustees and, in particular, the Ninth Circuit recently concluded that the fiduciary exception applies to insurance companies serving as ERISA fiduciaries. See Stephan v. Unum Life Ins. Co., 2012 U.S. App. Lexis 19139 (9th Cir. 2012).

Application of the Fiduciary Exception in Connecticut

Connecticut, like most jurisdictions, has a "long-standing, strong public policy of protecting attorney-client communications." *Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico*, 273 Conn. 315, 321, 869 A.2d 653 (2005) (citations and internal quotation marks omitted). The privilege, which "protect[s] a relationship that is a mainstay of our system of justice," is "designed, in large part, to encourage full disclosure by a client to his or her attorney so as to facilitate effective legal representation." *Id.* at 321-22.

There exists no dispositive Connecticut appellate court authority regarding the applicability of the "fiduciary exception" in Connecticut. However, a recent Superior Court decision, *Hubbell v. Ratcliffe*, 2010 Conn. Super. LEXIS 2853 (Super. Ct. Nov. 8, 2010), refused to recognize the fiduciary exception in Connecticut.

In his decision, Judge Robert Shapiro of the Superior Court Complex Litigation Docket in Hartford noted that "the attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships." *Id.* at *13 (quoting *Huie*, 922 S.W.2d at 924). Further, the court noted that "[w]ithout the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience." *Id.* at 13-14 (quoting *Huie*, 922 S.W.2d at 924). The Court concluded, in the context of the Hubbell facts, that the beneficiary had made no sufficient showing that the reason for the disclosure outweighed the potential chilling effects on essential attorney-client communications. Id. at 15.

Moreover, the Court determined that paying an attorney out of trust funds does not convert trust beneficiaries into clients of the trustee's attorney. *Id.* at 15. Specifically, the Court noted that "[a]n attorney's allegiance is to his client, not to the person who happens to be paying him for his services." *Id.* (quoting *Spring v. Constantino*, 168 Conn. 563, 575, 362 A.2d 871 (1975)).

The *Hubbell* decision also distinguished Federal District Court Judge Bryant's decision in *Parker v. Stone*, 2009 U.S. Dist. LEXIS 33554 (D. Conn. Apr. 21, 2009).

While noting the absence of any controlling precedent on the issue in Connecticut, the Court in Parker found the fiduciary exception applicable to documents relating to the administration of an estate sought by a beneficiary from a court-appointed conservator. *Id.* at 9-13. The Court, however, declined to require production of any documents prepared in connection with or in anticipation of the litigation. *Id.* The *Hubbell* decision distinguished the Parker decision concluding, in part, that the decision relied on New York case law which had been abrogated by statute. *Hubbell*, 2010 Conn. Super. Lexis 2853, at *10-11.

Conclusion

Given the absence of controlling appellate authority in Connecticut on the applicability of the fiduciary exception to the attorney-client privilege, a fiduciary labors under some uncertainty as to the extent and circumstances under which a trustee may claim the attorney-client privilege against a beneficiary requesting disclosure of attorney-client communications between the fiduciary and the fiduciary's counsel. Therefore, in circumstances of foreseeable litigation with a beneficiary, to endeavor to ensure that the attorney-client privilege will be preserved, prudence may dictate that the fiduciary independently retain counsel, clearly memorialize in the engagement letter that the attorney represents only the fiduciary in a personal non-administrative capacity and consider whether to pay for the services of the attorney out of its own resources.

---

[1] *See also, Roberts v. Fearey*, 986 P.2d 690, 694 (Or. Ct. App. 1999) ("[W]hen an attorney undertakes to represent a fiduciary, he or she represents only the fiduciary and does not, at the same time, maintain an attorney-client relationship with those to whom the fiduciary-client owes a duty."); *Spinner v. Nutt*, 631 N.E.2d 542, 544-45 (Mass. 1994) (holding that attorneys advising trustees owe duties only to their clients, the trustees, otherwise "conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee.").

[2] *But see, Riggs National Bank* 355 A.2d at 711.♦

Life Insurance Policy Reviews: No Better Time than Now

By: Daniel J. Munroe, JD, CLU
National Madison

Attorneys understandably tread cautiously when speaking with clients about life insurance products. While they are generally comfortable recommending how much life insurance a client might purchase to meet certain objectives, many are reluctant to recommend specific insurance products, carriers, or agents.

One reason for the hesitation is due to the difficulty of knowing whom to trust in receiving objective advice and analysis. In addition, circumstances under which your clients purchased their life insurance policy may be far different now than they were when the policy was purchased. For many, life experiences, objectives and goals have changed the needs for their insurance. Examples can range from providing for one's family in the event of premature death, to business continuation planning, to a liquidity event to pay for estate taxes.

Why Conduct A Policy Review?

Changes in Health

For clients who are in good health, a review might uncover that they could pay less for their policy, or possibly even increase their coverage for the same premium. Use of more current mortality tables (which account for Americans generally living longer) have caused insurance premiums to drop as life expectancy has increased.

Additionally, medical advances have made coverage more affordable for some individuals by now allowing them to obtain coverage in preferred or standard rating classes. Perhaps your client smoked, had high